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CONSTITUTIONALITY OF A WORKMEN'S COMPENSATION LAW.

The New York Workmen's Compensation Law of 1910, made mandatory on employer and optional on employee, as to certain dangerous employments, has drawn first blood in a New York trial court in an attack on its constitutionality. Ives v. The South Buffalo Ry. Co., 63 N. Y. Law Journal 2371.

The optional feature on behalf of employees consists in an election after accident either to accept the compensation prescribed by the new compensation act, or to waive that and sue under employers' liability act. Having once made election all other rights are barred. This feature of the law was attacked as unconstitutional.

In the case before the New York court the opinion on the question of constitutionality says: "Plaintiff brings himself squarely under the provisions of the act by alleging facts that establish as admitted by the answer, that, while employed by defendant as a switchman, he was injured in the prosecution of his work without negligence on the part of the defendant, and 'without serious or willful misconduct' on his part, but solely by reason of a necessary risk or danger of his employment, or one inherent in the nature thereof (Sec. 217). Prior to the enactment of the statute above cited he would have been without remedy. By virtue of its provisions he is entitled to recover according to a fixed scale of compensation, without establishing that the employer is at fault in any way (Sec. 219a.)"

The pleadings seem here to have been framed with a view to getting a decision squarely upon the constitutional question and we, therefore, suppose that the case will be as little delayed as possible on its way to the federal supreme court, as the due process of law clause of the federal constitution would seem to be involved. Therefore this case, as a pioneer one in this kind of legislation, will be watched with considerable interest.

The opinion states the issue as follows: "Defendant maintains that, under our system of constitutional government, the incorporation into our law of the English law of workmen's compensation is beyond the powers of the legislature. First, because the act in question deprives the defendant of liberty and property without due process of law, and denies it the equal protection of the laws in contravention of the Fourteenth Amendment of the United States Constitution, and Article 1, Section 6, of the constitution of this state. Second, because it violates the right of trial by jury guaranteed by Article 1, Section 2, of the Constitution of this state. Third, because it limits the amount recoverable in actions to recover damages for injuries resulting in death in contravention of Article 1, Section 18 of the constitution of this state."

The argument seemed to proceed upon two grounds: First, that there could be no such classification as the statute attempts, and, of course, this objection is confined to a railroad, such as defendant was, being included as a dangerous employment; second, that the act imposes a liability upon one without fault.

This latter ground is the more formidable, but the court gives several examples of legal liability without fault, and of owners being deprived of their property where no fault is attributable to them. The opinion says: "The law of deodands was such an example. The personification of the ship in marine law is another. Other examples are offered in the common law liability of the husband for the torts of the wife, or liability of the master for the acts of his servant. (The Osceola, 189 U. S. 158; Chicago, R. I. & P. Ry. v. Zernecke, 183 U. S. 582.)"

The Zernecke case seems closest to the question before the court, where a Nebraska statute, which made railroad companies liable for all damages inflicted upon the persons of passengers, while being transported

over their roads, except where the injury arose from criminal negligence of the person injured, was upheld.

The federal supreme court cited Nebraska supreme court's opinion with approval, the latter court justifying the legislation under the state's police power. "It was enacted to make railroad companies insurers of the safe transportation of their passengers as they were of baggage and freight."

The dangerous employments mentioned in the New York law are divided into eight classes, and no such reasoning could be employed as to the other seven as was used by the Nebraska court. These embrace bridge building or destruction; elevators, derricks and hoisting apparatus; work on scaffolds; work in connection with electricity; work in necessary proximity to explosives; railroads; constructing tunnels and subways, and work carried on under compressed air.

As, however, the police power may intervene because of the dangerous character of employment, the legislative inclusion of a particular employment must as to its rightfulness present the same kind of question as where for purposes of eminent domain a certain use is legislatively declared to be a public one, viz,: the legislature prescribes the use, the courts say if it is a public one under the constitution.

At all events this case suggests the thought that the questions raised seem to be in a forum much to be preferred, than were they raised in one of the lower federal courts. Nothing therein would be settled but the federal questions. But this case going through the state courts to the federal supreme court, if the highest state court affirms the judgment, so far as state law is concerned, an important question comes to be settled both locally and generally. It would be something of a pity, for the New York jurisdiction, at least, if the federal supreme court were in a case going up from a federal circuit court to sustain the federal constitutionality of the New York act, for it afterward to be discovered, that the question was largely a moot one. But it would have about it an element not lacking altogether in humor, in that one of these corporations, that is bold enough to do business in a state and is yet afraid of its courts and juries, had run into a trap of its own setting.

NOTES OF IMPORTANT DECISIONS

CONTRACTS—SERVICES DURING MERETRICIOUS RELATIONSHIP—The rule quite strictly enforced is that a contract in itself lawful and violating no rule of policy or morals may be enforced, notwithstanding performance is associated, or at least contemporaneous, with some illicit relation between the contracting parties. For example, the Oklahoma Supreme Court follows a well-defined line of cases, which rule, that an express contract for services to be rendered by a woman for a man as his housekeeper is valid and enforceable, though the parties entering into it live together in a state of concubinage during the time the services are rendered, provided the contract be not made in contemplation of there being such relationship. Emerson v. Botkin, 109 Pac. 531. See also Lytle v. Newell, Ky., 68 S. W. 118; Cooper v. Cooper, 147 Mass., 372, 17 N. E., 892, 9 Am. St. Rep. 721; Succession of Pereuilhet, 23 La., Ann. 294, 8 Am. Rep. 595. Of course, it might be difficult for one performing the services to establish clearly the contract and its complete dissociation from the illicit relationship.

And, at all events, the course of decision seems quite generous to the woman in distinguishing between cases where the illicit relationship is contemplated ab initio and where continuance therein is contemplated after the services have begun to be performed. The Louisiana court in one of the cases above referred to expresses the reason of this generosity by saying that: "An employer cannot pay off a female employe by robbing her of her virtue. * * * If concubinage had been alleged and proved to have been the motive and cause of the parties living together in the same house in the first instance, and the services in question to have been merely incidental to such a state of living, our conclusion might have been different." Yet it seems to be, that, if a man wants to get out of being held to his contract to pay his concubine for services, he must first debauch her and then have her for his concubine under an arrangement to pay her as his housekeeper. The rule may sometimes have about it more of technicality than justice.

MECHANICAL EQUIVALENTS IN THE LAW OF PATENTS.

At the outset, the principle of patent law should be remembered that letters-patent for inventions ought to receive a liberal construction. Enlightened public policy and sound political economy not only justify but require this. The contribution of inventors to the progress of the arts and sciences and the benefits conferred by them upon mankind are so extensive that they are well entitled to the reward given them by the grant, for a limited term, of the monopoly of their contributions to human knowledge. Since the commercialization of an invention, by which the public is as much benefited as by the inventive act itself, requires patience, perseverance, genius and capital; those who stand in the relation to inventors of assignees are, also, deserving of full protection of the investment of time, labor and money, that they have made in connection with inventions. Innumerable quotations can be made from the decisions of the courts in which the wisest and ablest judges have said that letters-patent for inventions are entitled to liberal construction in respect to all questions that may arise concerning same, and that the monopolies granted thereby are not of the kind that the common law has always regarded as odious; but, on the contrary, are of the kind that are beneficial to the community, because they stimulate inventive activity and ability by affording a reward consisting in exclusive rights to the thing invented, which thing did not exist until called into being by the inventor, and which, after being created by him, remains entirely his own until disclosed by him to the public.

The reward of invention is, therefore, circumscribed by the bounds of what has been produced that was formerly unknown. It is proper that this should be so, for no one possesses the right, under the guise of pretended invention, to pre-empt anything from the public domain and from that which was previously free to all. When limited to what is new, however, all should rejoice to see inventors properly rewarded, and, indeed, their reward frequently is in the nature of mere recompense for the money, time and efforts expended by them in the production or development of their inventions or of their attempts to introduce them into practical use.

While inventions should, for these reasons, be looked upon with favor by the law, and patents for them should be liberally treated by the courts, yet the rights of the public are as important as those of inventors, and no inventor, or those deriving their rights from him, should be allowed by the courts to assert a monopoly over that which he did not invent or over any part of the field of knowledge that existed prior to his addition thereto. Still less should the courts, by the application of changeable, elastic, arbitrary, or unreliable random judgments to cases, throw the administration of the patent law into chaos. It is to be feared that, to a large extent, the so-called doctrine of mechanical equivalents, as applied by the courts, has been no more than a veil under which the courts have decided cases upon more subjective impressions in disregard of objective criteria.

It is the purpose of this paper to cite some examples to justify this statement, numberless instances of like character being found in the reports, and it is the further purpose of this paper to reconcile two fundamental principles of patent law that have been in practice put in opposition to each other, and thus to lay down the true rule for determining what are mechanical equivalents, and, particularly, when that canon known as the doctrine of mechanical equivalents in patent law can rightfully be applied to a particular case.

Probably the best idea of the nature of the most important aspect of the problem especially to be considered in this paper can be most readily conveyed by reference to a concrete case. A suitable example to make this point clear is found in the case of Benbow-Brammer Manufacturing Company v. Straus,[1] in which claim one of the Schroeder patent, No. 535,465, dated March

(1) 166 Fed. 114.

12, 1895, was involved, that claim reading as follows: "An operating shaft having a rotary reciprocating motion, a cylinder placed upon the shaft *and having a sliding movement thereon,* and through which cylinder motion is alone communicated to the shaft, and a double row of teeth or cogs upon the cylinder extending at an angle to the shaft, combined with a driving shaft having means for revolving it attached to one end, and a wheel for engaging the teeth on the cylinder at the other, the driving shaft being driven continuously in one direction, substantially as shown."

The opinion of the court contains the following: "The defendants' structure is described at length, and we think correctly, in the opinion of the judge of the circuit court. It shows a skillful attempt to avoid the claim by the substitution of well-known equivalents for some of the elements which do the identical work of the Schroeder combination. In both structures the stirrer is agitated by a rack and pinion motion, the rack being located on the operating shaft and the pinion on the driving shaft. *The main difference between the two is that in Schroeder's machine the reciprocating motion is produced by the up and down movement of the rack and in defendants' by the up and down movement of the pinion.* This change is accomplished by substituting for the draving shaft of the claim a driving shaft which, as the defendants' brief asserts, 'is well known in mechanics as a "floating" shaft', and making the necessary mechanical changes incident to the substitution."

The mechanical movement defined by the above-quoted claim was used by complainant and defendants as the operating mechanism for washing machines, the effect in both machines being that, by rotation of a crank-handle or fly-wheel continuously in one direction, the clothes-stirrer in the tub would rotate back and forth. That operation in washing machines large numbers of prior patents showed to be old at the date of the application for the Schroeder patent, and, therefore, the question involved in the above-cited case related solely to the particular form of mechanism for producing such reciprocatory rotary motion of the clothes-stirrer. The drawings of the Schroeder patent illustrate a device in which a slidable cylinder is mounted on a vertical shaft, to which shaft at the lower end, is attached the clothes-stirrer. A segmental rack on said cylinder is engaged by a pinion mounted on the inner end of a driving shaft, to the outer end of which driving shaft is attached the crank-handle or fly-wheel. Continuous rotation of said driving shaft causes the pinion mounted on its inner end to force said segmental rack to travel in the direction opposite to the direction of rotation of said pinion until the entire length of the rack has passed through engagement with said pinion, at which time a prolongation of the driving shaft that extends inwardly beyond said driving pinion and into engagement with a cam groove, causes the slidable cylinder bearing said segmental rack to slide upon the operating shaft, so as to present to engagement with said driving pinion, the opposite face of said segmental rack from the one previously engaged. This new face of the segmental rack then travels its entire length in engagement with the driving pinion, as the driving pinion is continued in its rotation in the same direction as formerly. At the end of the travel of the second face of said segmental rack in engagement with the driving pinion, the cam groove in the cylinder and prolongation of the driving shaft again force the cylinder to slide so as to cause engagement of the opposite face of the segmental rack with the driving pinion. Obviously, as the driving pinion is rotated continuously in one direction, the segmental rack and cylinder to which it is attached will rotate, first, in one direction and then in the other, dependent upon which face of the segmental rack is in engagement with the driving pinion, which results in the reciprocatory rotation of the operating or clothes-stirrer shaft, upon which the slidable cylinder is mounted in such manner as to impart the rotary movement of said cylinder to said shaft. Thus an angular shaft may be utilized which passes through

an angular hole in the cylinder, or the cylinder may be splined on said shaft.

For our present object lesson, however, the main point to be observed is that the claim involved in the above-mentioned case was explicitly by its terms limited to a slidable cylinder, while the defendants' device was constructed with a non-slidable cylinder. In defendants' device, the movement necessary to allow for the alternate engagement of the opposite faces of the segmental rack is secured by the use of a floating pinion. This driving pinion is mounted on the inner end of a driving shaft having a universal joint connection with the shaft of the fly-wheel or crank-handle. This universal joint allows the driving pinion to "float," by which means said driving pinion is able to ride on, first one side of the segmental rack and then on the other. This is, if you please, mere reversal of parts. Both devices allow for such shifting that the opposite faces of the segmental rack may be alternately engaged by the driving pinion. The defendants' device accomplished this by means of a shifting pinion, while the claim of the patent is limited to a shiftable cylinder. Doubtless, language could have been employed in the claim that would read on both structures, but clearly a claim limited to a structure containing a slidable cylinder does not read upon a structure in which the cylinder is stationary, no matter whether or not the absence of movement by the cylinder is compensated for by the provision of movement of something else. If the language in the claim had been broad enough or appropriate to read on both structures, it would have been immaterial that the drawings of the patent disclosed only one of the forms; but, as said by the United States Circuit Court of Appeals for the Eighth Circuit, in discussing the same patent in the earlier case of Brammer v. Schroeder[2]: "The purpose of a claim of a patent is to designate the limits of the machine or combination which the patentee has invented or discovered."

(2) 106 Fed. 918, 930.

The statute[3] explicitly provides that "Before any inventor or discoverer shall receive a patent for his invention or discovery, he shall * * * particularly point out and *distinctly claim* the part, improvement, or combination which he claims as his invention or discovery."

The reason why it is required by the law that an inventor shall accurately and distinctly designate by the claim or claims in his patent precisely what he thinks he has invented, and for which he desires a monopoly, is chiefly to afford information to the public as to what constitutes the monopoly fenced off for his benefit by his patent. The public has the right to breathe the circumambient atmosphere notwithstanding the fact that some one has obtained a patent for a particular form of ink-well. to enjoy the sunshine notwithstanding the issuance of some patent for an electric lamp; and generally to use every mechanical device or the like which has not been pre-empted for a period of seventeen years by its inventor. As said by the Supreme Court of the United States in the case of Pope Manufacturing Company v. Gormully,[4] the rights of the public to use that which cannot be lawfully monopolized is just as important, and should be as jealously guarded as the rights of a real inventor; and the United States Circuit Court of Appeals for the Eighth Circuit in the case of Brammer v. Schroeder,[5] involving this same patent, said that every patent should be "so interpreted by the courts as to protect the inventor against piracy and the public against unauthorized monopoly."

Obviously, if an inventor makes a mistake in drafting his claim and does not make it broad enough in its terms to cover his actual invention, the public would be misled to its injury if such inadequate claim were given a construction broader than its terms. Under such circumstances, while anyone would regret, for the sake of the inventor, that he had not so drawn his claim

(3) Sec. 4888 R. S. U. S.

(4) 144 U. S. 224, 234, 12 Sup. Ct. 632, 36 L. Ed. 414.

(5) Above mentioned (106 Fed., page 920.

as to obtain effective protection for his invention, nevertheless, the courts in pursuance of sound public policy refuse to expand or change even such an inadequate claim, for the reason that it would be an injustice to the public if, after the public had inspected and acted upon the claim as actually contained in the patent, the courts were to give effect to something different. Unless the public can obtain from the claim of the patent precise information as to the limits of the monopoly of the patent, the public has no means whatever of determining what is marked off by the patent from the public domain. The public is justly entitled to this information. It would be an abominable hardship upon the public and a blighting influence upon trade and manufacture if no one were able in a definite and accurate manner to ascertain, by examination of the claims of unexpired patents, what are the existing monopolies from which it is necessary during their existence to exclude himself. and this would be impossible if the claim did not in each case accurately and for all legal purposes define the exact invention monopolized.

It must be understood that a claim in a patent is not a mere *suggestion* of what the alleged invention is, but is a *definition* of it. In other words, as Mr. Justice Bradley said in figurative language in the case of White v. Dunbar,[6] a claim in a patent is not "like a nose of wax which may be turned and twisted in any direction, by merely referring to the specification, so as to make it include something more than, or something different from, what its words express."

It would be as just for the owner of land to mark the limits of his estate by rolling stones and then to bring actions for trespass against those who unwittingly invaded his imaginary and movable boundaries as for an inventor to claim one thing in his patent and then to seek by elastic construction of his patent to include within its scope devices not only unsuggested by his patent but explicitly excluded from the monopoly of his patent by the language of his claim, whereby, under the law, he apprised the public of the nature and limits of his monopoly,

In cases beyond number, the courts have enunciated, reiterated, ratified and reaffirmed the principle of law to which we have just referred, of which judicial expressions we shall quote a few. In the case of Dunlay v. Willbrandt Surgical Mfg. Co.,[7] the United States Circuit Court of Appeals for the Eighth Circuit tersely stated this principle as follows: "It is the claim which measures the rights of the patentee, and that which is not claimed is, so far as the particular patent is concerned, dedicated to the public." In the case of Monroe v. McGreer[8] Judge Woolson (citing the decision of the United States Circuit Court of Appeals for the Eighth Circuit, in the case of Stirrat v. Excelsior Mfg. Co.,[9] said: "If plaintiff's rights herein are to be measured and determined by his specifications, then the 'extension stem' and its hook, as used by defendant, would be included in plaintiff's patent. *But the claims as stated in the letters-patent, and not the specifications therein stated, are the measure of plaintiff's rights under his letters.*"

The United States Circuit Court of Appeals for the Eighth Circuit, in the case of Lanyon Zinc Co. v. Brown,[10] declared another well-settled principle of patent law, in the following language: "It is an elementary rule that a patentee may claim the whole or a part of what he has invented. He is entitled to limit his claims to any extent that may seem desirable, but, having done so, his right to protection is also limited, since the claim actually made by the patentee is the measure of his right to relief."

Robinson on Patents[11] sets forth the unquestionable law on this subject as follows: "The claim is thus the life of the patent so

(6) 119 U. S. 47, 30 L. Ed. 303, 305.

(7) 151 Fed. 223, 227.
(8) C. C. S. D. Iowa, E. D., 81 Fed. 954, 956.
(9) 10 C. C. A. 216, 220, 61 Fed. 980, 984.
(10) 129 Fed. 912, 915.
(11) Vol. II., page 111, section 505.

far as the rights of the inventor are concerned, and by it the letters-patent, as a grant of an exclusive privilege, must stand or fall. The thing patented is the thing claimed, whatever the patentee may suppose or assert that he has invented; and though the statement of the claim comes short of the true limits of the invention, the inventor must abide by them, as he has described and published them in this written definition of its character and scope. The courts will not go into the history of the art to ascertain what he has really discovered and what he might have patented if he had chosen, but will take him at his word and protect him according to the terms in which he has himself demanded such protection."

The Supreme Court of the United States, in White v. Dunbar,[12] said: "Some persons seem to suppose that a claim in a patent is like a nose of wax which may be turned and twisted in any direction, by merely referring to the specification, so as to make it include something more than, or something different from, what its words express. The context may undoubtedly be resorted to, and often is resorted to, for the purpose of better understanding the meaning of the claim; but not for the purpose of changing it and making it different from what it is. The claim is a statutory requirement, prescribed for the very purpose of making the patentee define precisely what his invention is; and it is unjust to the public as well as an evasion of the law, to construe it in a manner different from the plain import of its terms. This has been so often expressed in the opinions of this court that it is unnecessary to pursue the subject further."

Accurate definition of the invention which is supposed to be protected by a patent is, as Mr. Justice Clifford said speaking for the Supreme Court of the United States in the case of Bates v. Coe,[13] "required by law, for several important purposes: (1) That the government may know what is granted and what will become public property when the term of the monopoly expires. * * * (2) That other inventors may know what part of the field of invention is unoccupied."[14]

As patents are procured *ex parte*, the public is not bound by them, but the patentees are. And the latter cannot show that their invention is broader than the terms of their claim; or, if broader, they must be held to have surrendered the surplus to the public."[15]

Courts are bound by the language chosen by the inventor in framing his claims, and they have neither the right nor the power to enlarge a patent beyond the scope of the claims, even though the patentee may have been entitled to something more than the words he has chosen to use will include.[16] Where a patent does not cover all that the inventor intended, he should surrender it and obtain a re-issue; for, where the language of the claim is plain, the court cannot by construction enlarge it.[17]

Thousands of decision of the courts to the same effect as those referred to above, can easily be cited. The principle of law voiced by them is, therefore, past gainsaying. Such decisions are so obviously founded in inherent justice, which as well as the statute, requires that the public shall be apprised of the exact thing patented, that it is incomprehensible how any court could be found that would render a decision

(12) 119 U. S. 47, 30 L. Ed. 303, 305.
(13) 98 U. S. 31, 25 L. Ed. 68, 71.

(14) "It is true the patent cannot be extended beyond the claim. That bounds the patentee's right." Wood-paper Patent, 23 Wall. 606, per Strong, J.

(15) Keystone Bridge Co. v. Phoenix Iron Co., 95 U. S. 279, per Bradley, J. "Where no patent is granted, the invention, however novel, ingenious, or useful, may be used by any one; and, when a patent is granted, the patentee must stand by his patent. He gains no exclusive right except for such a machine as his patent describes and secures, though it may be far less broad or comprehensive than his actual invention." Waterbury Brass Co. v. Miller, 9 Blatchf. 77; 5 Fish. Pat. Cas. 48; Merw. Pat. Inv. 106; Fed. Case No. 17, 254, 29 Fed. Cas. 385, 392, per Woodruff, J. "The patent is a notice to all the world, not only of the improvements claimed, but of those that are dedicated to the public, and the patentee is justly estopped from subsequently claiming the latter." O. H. Jewell Filter Co. v. Jackson, C. C. A., Eighth Cir., 140 Fed. 340, 347, per Sanborn, J.

(16) Seabury v. Johnson, 76 Fed. 456.
(17) Becker v. Hastings, 22 Fed. 827.

so unjust to the defendant as to hold, as in the principal case mentioned above,[18] that a claim in a patent which by its terms is limited to a slidable cylinder is infringed by a device embodying a non-slidable cylinder.

The principle on which the decision of the United States Circuit Court of Appeals for the Second Circuit decided the Benbow-Bramer case is supposed to be that denominated in legal language the application of the doctrine of mechanical equivalents. In literature, the principle on which that decision is founded is that invoked by Portia in that part of her argument in which she asked the court, in order to do a great right, to do a little wrong. Casuists, jurists and dialecticians will, however, strive in vain to solve the problem why justice to a plaintiff is more desirable or important than justice to a defendant.

As hereinbefore stated and shown, we are not of those who decry inventions or patents. On the contrary, we think that, for the soundest of reasons, inventors are worthy of great consideration, and that a patent should be liberally construed with regard to all questions that arise concerning it. We contend, however, that the doctrine of mechanical equivalents in patent law is not a mask under which a court can decide any case as it chooses, but is a canon which can be applied only after the language of the claims has first been accorded its full, true and exact force.

For instance, if in a claim there be mentioned as an element "a support," that term will read upon almost any mundane object. If the particular form of support shown in the drawings and described in the specification of the patent containing a claim including as one of its elements said "support" be varied in the alleged infringement, it infringes nevertheless, whether it be in the form of a bracket, a shaft, a wheel, a standard, a lever, or any one of a multitude of other well-known forms of support. If, however, the claim for the element herein before referred to as "a support" is denominated in the claim "a supporting shaft," such claim will not be infringed though all the rest of the combination set forth in that claim be used if for the "supporting shaft" be substituted a lever or a bracket or any other of the multitudinous mechanical equivalents for "a supporting shaft."."

Blackstone tells of a Roman emperor who was such a monster of injustice that he wrote his laws or decrees in small letters and then placed them high on tall pillars, so that his subjects could not know the laws that they were to obey. It is respectfully submitted that the doctrine of mechanical equivalents in patent law, when applied in such manner as to disregard the terms of claims in patents is the twin brother of that Roman emperor.

The authorities hereinbefore cited, abundantly show that the law is that the terms of the claims must first be heeded and that the primary test of infringement is whether or not a claim of a patent will read upon the device charged with infringement. If the claim will not read on it, infringement is absent. If the claim will read on the device charged with infringement, other tests of infringement may then be applied, and within the terms of the claim the doctrine of mechanical equivalents may be invoked. To ignore the terms of claims in letters-patent for inventions, however, and to disregard the limitations expressed therein, even where the invention stands with relation to the prior art in the position of a primary or pioneer invention, is not law, but anarchy. The hypothetical custom used as an illustration by Blackstone of a custom which would not have the force of law because of its uncertainty, namely, that a man's estate should descend to the worthiest of his children, would by no means be so uncertain in its application as the misuse of the name "mechanical equivalents" for devices outside of language of a claim in a patent for an invention.

If the terms of claims are to be ignored and anarchy is to be endured by a long-suffering business community, the question

(18) Benbow-Brammer Manufacturing Co. v. Straus, supra.

of infringement in patent cases will be determined by the fluctuations of the weather and other producers of subjective impressions. In some senses, if a point of view with a broad enough aspect be assumed, almost anything is the mechanical equivalent in a general sense for everything else. A lead pencil is the mechanical equivalent for a pen, and *vice versa*, when regarded from the standpoint of the most important function of each, that is, to produce visible legible characters. If, however, the terms of the claims of patents for inventions relating to recent improvements in either be regarded, the question of their mechanical equivalency is properly eliminated from the consideration of the case. In their most important function of carrying persons and as has yet been recorded, no court has held goods, a farm wagon is the mechanical equivalent of an automobile; but, so far any farm wagon an infringement of the Selden automobile patent.

There is no safety or justice in the administration of the patent law with relation to the question of infringement except, first, to give the full, true, and exact meaning to the terms of the claim or claims involved, and, then, *within their limits* to apply the principles that a change of form or a change of location or a reversal of parts, or the making in one part what had previously been made in two, or the making in two parts what had previously been made in one, or the substitution of a mechanical equivalent does not avoid infringement and like principles.

Doubtless the United States Circuit Court of Appeals for the Second Circuit was influenced toward its decision in the case of Benbow-Brammer Manufacturing Co. v. Straus,[19] by the fact that the lower court had decided in favor of the complainant. But it is part of the humor of the situation that the first authority relied upon by the judge of the lower court for his application of the (?) doctrine of mechanical equivalents reads as follows: "Courts look with favor upon patents for primary improvements which are novel, and a manifest departure from the principles of prior structures, and which constitute the final step necessary to convert failure into success. * * * A strict construction of the claims of a patent should not be resorted to, if the result would be a limitation on the actual invention, UNLESS IT IS REQUIRED BY THE LANGUAGE OF THE CLAIM. * * *"[20]

(19) Supra.

The claim under consideration by the court in that case was limited to a construction having therein a sliding cylinder, but the court held that claim infringed by a construction which omitted the slidable cylinder and substituted therefor a non-slidable one. The first authority quoted by the court for this remarkable application of the doctrine of mechanical equivalents explicitly laid down that that doctrine could not override limitations expressed in the claim.

The United States Circuit Court of Appeals for the Second Circuit had, also, in an earlier case[21] said: "The claim is a statutory requirement prescribed for the purpose of making a patentee define what his intention is so distinctly and exactly as to apprise other inventors, and the public, what is withdrawn from general use. The claim, however, is to be read in the light of the description contained in the specification, and its literal terms may be enlarged or narrowed accordingly, *but not to an extent inconsistent with their meaning.*"

Rules of construction of patents that are not as fair to plaintiffs as to defendants and to defendants as to plaintiffs are founded in injustice. Still worse is it for the courts to apply to the case for one plaintiff different canons of decision from those applied in other cases or to treat one defendent differently from some other defendant. It is believed that the following rules for the construction of patents are fair to both sides of each controversy, and should be consistently applied in all patent litigation by all courts.

(20) Wagner T. Co. v. Wyckoff, S. & B. 151, Fed. 585; 81 C. C. A. 129.

(21) Thomson-Houston Electric Co. v. Elmira & Horseheads Ry. Co., 71 Fed. 396, 404.

General Rule for the Construction of the Claims of Patents Which Equally Guard the Rights of the Patentee and the Public. —In the interest of public policy (on account of the benefits that the patent system confers on the country, and because inventors contribute to the knowledge of mankind and economic progress and general convenience), the claims of patents are to be liberally construed as against alleged anticipation and to find infringement. This rule does not permit the reading into a claim of anything not expressed therein, so as to avoid anticipation, nor does it permit reading out of it anything, or varying same, to find infringement. An equivalent for an element is the same thing as that element, but nothing is an equivalent, within the meaning of this rule, unless the terms of the claim involved will read thereon. The doctrine of equivalents applies to all patents and to all kinds of inventions, but the extent of its application depends upon whether the invention is a primary one or a trifling improvement or falls between these two extremes. A more extended range of equivalents will be allowed where the invention is of an important and pioneer character than in the case of inventions of lesser importance, and in each case is proportioned to the relative position which the invention holds in the art. The doctrine of equivalents applies both forward and backward, and the same tests of equivalency must be applied in disposing of the facts of the case to determine both anticipation and infringement. That which will infringe if later will anticipate if earlier. The terms of a claim absolutely control the determination of the questions of anticipation and infringement, and a claim of a patent is not like a nose of wax which may be turned and twisted in every direction. If the terms of a claim be clear, neither interpretation nor construction is necessary or permissible. The only purpose for which the specification or drawings may be consulted is to determine the meaning of anything in a claim which may be ambiguous, but it is the claim which is the measure of the grant. If too broad, it will be invalid when anticipated in terms, though not in substance. If too narrow, it will not be infringed by that which does not correspond to its terms, even though it appears that the substance has been imitated. In case of doubt, the doubt should be resolved in favor of the patent, both as regards sustaining its validity and finding infringement.

While we have used the case of Benbow-Brammer Manufacturing Company v. Straus, *supra,* as an example of the misapplication of the doctrine of mechanical equivalents, yet it is not the only case to be found in the books in which the injustice to a defendant has been perpetrated of construing the claim of a patent contrary to the plain import of its terms, in disregard of the limitations expressed therein.[22]

HUGH K. WAGNER.

St. Louis, Mo.

(22) In truth, so numerous are the instances of this form of injustice found reported in the books that it may require the enactment of a statute to eradicate the evil and to that end I propose the following statute: Be it enacted by the senate and house of representatives of the United States of America in Congress assembled: That it shall be unlawful for any court in construing any claim of letters-patent for an invention to hold, under the doctrine of mechanical equivalents or otherwise, as an infringement thereof anything on which the terms of such claim understood according to their plain import will not read.

INSURANCE—ESTOPPEL.

SCHUSTER v. KNIGHTS AND LADIES OF SECURITY.

(Supreme Court of Washington. Sept. 7, 1910.)

By retaining for more than a year after accused's death assessments paid on a life certificate, a beneficial association estopped itself to claim that the certificate was not reinstated after its suspension for nonpayment of assessments, where the delay in tendering the assessments back was unexcused; the association being bound on proof of death to pay the certificate or refund the money paid as assessments claimed to have been received by the local secretary without authority.

Department 1. Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Action by Nicholas H. Schuster, guardian, against the Knights and Ladies of Security. From a judgment for defendant, plaintiff appeals. Reversed and rendered.

Scott and Campbell, for appellant. Samuel

T. Crane and Fred H. Moore, for respondent.

GOSE, J.: The defendant is a foreign corporation, organized and doing business as a fraternal beneficiary society. It has a subordinate lodge in the town of Chattaroy in this state, known as Royal Council No. 1380 of the Knights and Ladies of Security. On the 27th day of October, 1906, Minnie A. Schuster became a member of the lodge at Chattaroy, and the defendant issued to her a beneficiary certificate in the sum of $1,000, payable to her daughter, Ethel H. Schuster, upon the death of the assured. The assured thereafter made timely payments of her dues and assessments up to August 1, 1908. On September 30, 1908, her husband paid her assessments for the months of August, September, and October of that year to the financial secretary of the local lodge; she then being ill at the hospital in the city of Spokane. Her dues were paid up to January 1, 1909. The assured died on October 2, 1908. Thereafter due proof of death was submitted to the defendant, and payment was demanded and refused. This action was commenced for the recovery of the amount due on the policy on the 21st day of June, 1909. The defendant answered on the 24th day of September following. The assessments were transmitted to the defendant in October, 1908, by the financial secretary of the home lodge, and were retained by it until the last of September, 1909, when the amount was returned to the local secretary at Chatteroy, who tendered it to the plaintiff on October 9th following. It is conceded that the financial secretary of the local lodge was the proper officer to receive and transmit the assessments. The defendant's by-laws, which under the certificate, constitute a part of the contract of insurance, provide that the certificate of each member who has not paid his assessment on or before the last day of the month shall ipso facto stand suspended without notice; that no right thereunder shall be restored until it has been duly reinstated; that it may be reinstated within 60 days from date of suspension by payment of all arrearages, provided "that he be in good health at the time of reinstatement; provided, further, that the receipt and retention of such assessments or dues in case the suspended member is not in good health shall not have the effect of reinstating said member or of entitling him or his beneficiaries to any rights under his benefit certificate." They further provide: "The National Council shall not be liable for the illegal receipt of arrears of beneficiary or reserve fund, or National Council general funds or assessments, from suspended members, and the receiving of any such arrears, and receipting therefor by any officer of a subordinate council and the reinstatement of any suspended member except as provided in the laws of the order, shall not be binding on the National Council"—and that a member in default in the payment of his assessments for more than 60 days and less than 6 months can only be reinstated by the payment of all arrearages, and by presenting a health certificate approved by the company's national medical examiner. The plaintiff offered testimony tending to show that, when the husband paid the assessment on September 30, 1908, he informed the secretary of his wife's illness. This the secretary denies. Upon the facts stated, after both parties had submitted their evidence, a judgment was entered in favor of the defendant for costs. The plaintiff has appealed.

It was alleged in the answer, and it is urged here, that because of the illness of the assured the payment of the arrearages to the financial secretary within 60 days from the date of the suspension of the certificate did not reinstate it. A reference to the by-laws, to which we have adverted, will disclose that a payment of the assessments to the secretary within 60 days after the suspension of a certificate for the non-payment of an assessment reinstates the policy if the member is in good health, and that no method is provided for determining that fact.

The appellant contends that the retention of the assessments by the respondent after having notice of all the material facts operates as a ratification of its acceptance by the local secretary, and estops the respondent from asserting the invalidity of the certificate. We think this contention must be sustained. Summarizing the facts, it appears that the tender was made more than a year after the death of the insured, about four months after the commencement of the action, and fifteen days after answering. No excuse is offered for the delay. We have seen that the only reason assigned for the non-payment of the policy is that it was suspended in the lifetime of the assured for the non-payment of the assessments. Upon the facts stated, when proof of the death of the assured was submitted, it was the duty of the appellant to pay the policy or refund the money which it asserts the secretary accepted without authority. It should then have disaffirmed his acts, and restored, or offered to restore, the money. It sought to do the former, but made no pretense of doing the latter until October 9, 1909. The tender

was not timely. We are not unmindful of the language of the by-law quoted, but we are unwilling to stand sponsor for a principle of law which would uphold such a stipulation. The language seemingly has reference to the retention of assessments by local officers. But, if it includes the retention by the respondent, the injustice of the provision is too glaring to receive judicial sanction. Cunningly contrived provisions in policies, to the effect that local officers are the agents of the home lodge only, and that solicitors of insurance are the agents of the insured, have been ignored by the courts. The local secretary was the agent of the respondent. Hoeland v. Western Union Life Ins. Co., 107 Pac. 866. Modern Woodmen of America v. Tevis, 117 Fed. 369, 54 C. C. A. 293; Pringle v. Modern Woodmen of America, 76 Neb. 384, 107 N. W. 756, 113 N. W. 231.

To adopt the construction of the by-law contended for by the respondent, we would be required to hold that it could have continued to receive the assessments for twenty years, if the assured had lived, and then retained the money and claimed immunity from liability upon her death. That the retention of the money with knowledge of all the material circumstances operates as a waiver of the right to assert that the policy is suspended is supported by the following authorities: Staats v. Pioneer Ins. Ass'n, 55 Wash. 51, 104 Pac. 185; Rasmusen v. New York Life Ins. Co., 91 Wis. 81, 64 N. W. 301; Coverdale v. Royal Arcanum, 193 Ill. 91, 61 N. E. 915; 29 Cyc. 194, 195, 196; Masonic Mut. Ben. Ass'n v. Beck, 77 Ind. 203, 40 Am. Rep. 295; Life Ins. Clearing Co. v. Altschuler, 55 Neb. 341, 75 N. W. 862; Spits v. Mut. Ben. Life Ass'n, 5 Misc. Rep. 245, 25 N. Y. Supp. 469.

It is conceded that, under the abatement provisions in the certificate, the liability of the respondent is $850, if there is, in fact, a liability. We think that, under the admitted facts, the learned trial court should have directed a verdict for the appellant. The judgment will be reversed with direction to enter a judgment for the appellant for $850, with legal interest from the date of the death of the assured.

RUDKIN, C. J., and FULLERTON, J., concur.

CHADWICK, J.: I dissent. Mrs. Schuster had been a member of a local lodge of the Knights and Ladies of Security, but had voluntarily allowed her membership to lapse. She became ill, was taken to hospital in Spokane, where it was made known to her husband that she must submit to a capital operation. Thereupon her husband, the present plaintiff guardian, hastened to the home of the financial secretary of the local lodge and paid the arrearage of dues, as well as some in advance. Even though the local officer had notice or knowledge of the true state of facts, it should not be held to bind the company. The reinstatement was in direct violation of her contract, and was a fraud upon the membership. The policy was designed to prevent such frauds. It provides in terms that the receipt and retention of assessments or dues in case the suspended member is not in good standing shall not have the effect of reinstating the member or entitling the beneficiary to any rights under the beneficiary certificate. Beneficiary associations are not like insurance companies. Their affairs are not conducted for profit. The detail of their affairs are not conducted by trained business agents, but of necessity must go through the hands of lodge members, who are frequently unskilled in the ways of business and have no knowledge of the technical rules of the law. The parties had a right to make the contract in the terms stated, and should now be held to it. In my judgment the cases cited in the majority opinion are not in line with the case at bar. Indeed, no case will be found holding that a fraud can be worked against a voluntary fraternal benefit association under the cover of an estoppel.

The most the plaintiff is entitled to recover is the amount paid for reinstatement, and judgment should be entered for that amount.

MORRIS, J., concurs.

NOTE—*Estoppel from Retention of Premium Paid on Forfeited Policy.*—The principal case, seeming to this annotator a very harsh application of the doctrine of estoppel, he has consulted the cases it cites and submitted other authority, with the result as follows:

In Staats v. Pioneer Ins. Assn., *supra*, it was shown that the insurance company accepted a premium knowing that there was other insurance on the property and it retained it until after the loss, and the principle relied on was that the premium being accepted and retained with full knowledge of all the circumstances, while the policy was asserted to be in force, the estoppel arose.

In Rasmussen Ins. Co., *supra*, the facts show that after default assured sent the premium to a branch office, and, it being forwarded, the home office insisted on a medical examination as a condition to reinstatement of the policy. Insured refused to do anything further and demanded either a receipt for the premium or that his money be returned. This letter was received by local agent, May 22, and by home office, May 24, and nothing was done, and insured, dying on May 30, it was held there was a waiver of the forfeiture. The court said: "The duty of making an election (by the company) became then immediate and imperative. * * * The principle is familiar that, if an insurance company receives and retains a premium, when it has knowledge of an act of forfeiture, until after a loss has occurred, it will effectually waive a forfeiture."

In Coverdale v. Royal Arcanum, *supra*, all that was held was that if a lodge with full knowledge of the fact that a member was engaged in the business of a liquor dealer, the falsity of his state-

ment that he was not so engaged will not prevent an estoppel arising where the lodge *continues* to receive dues from him and *continues* to treat his insurance as valid up to his death.

In Ins. Co. v. Beck, *supra*, it was ruled that a distinct act of affirmance made with knowledge of the facts, especially such acts as the demand and receipt of premiums and assessments, would constitute a waiver.

In Clearing Co. v. Altschuler, *supra*, the facts show that a premium that was past due was paid on August 4 and on the 6th, a receipt in ordinary form was sent therefor. On the 14th the assured died and the company, on August 18th, returned the premium, claiming the insurance had never been in force, but the premium paid had been kept on deposit while awaiting a health certificate. The court says the letter of inclosure stated in plain language it was sent as a payment, and the company receipted for it as a payment. It was said to be merely an afterthought for the company to claim the payment was a deposit. "The company, with full knowledge of all the facts, dealt with the assured during his lifetime, on the assumption that his contract of insurance was in force, and it cannot, now that he is dead, be heard to assert that he was deluded by its agents into purchasing and paying for a still-born policy."

What is said in 29 Cyc. is: "It generally constitutes a waiver of the right to avoid the contract of insurance so to declare a forfeiture, where the society, with knowledge of the existence of grounds of avoidance or forfeiture, unconditionally accepts dues or assessments from the member in question, at least where the society retains the money thus paid, even though it was received and retained after the death of the accused."

The last clause of this quotation is supported by the case of Erdman v. Mutual Ins. Co., 44 Wis. 376, which shows that money was paid to a local lodge on the day the insured, who was in arrears, had been killed and that both the local and supreme lodge knew at the time of his having been killed. The supreme lodge received and retained the money until after suit was brought. The court said: "So if the defendant, with full knowledge of the time and manner of the payment of this money, accepted and retained it long after the commencement of this suit," it is estopped. Of course, it ought not to have accepted it.

All of the citations made by the principal case are of cases where there was an acceptance and retention with full knowledge of all the facts. If the court in its citation of 29 Cyc. had looked to the notes on page 195, it would have discovered that it is said: "Retention of payments does not constitute a waiver, however, where the society denies liability and offers to return the money." To this is cited the case of Taylor v. Grand Lodge, A. O. U. W., 96 Minn. 441, 105 N. W. 408, 3 L. R. A. (N. S.) 114, among other cases. In the Taylor case it was held that where the beneficiary certificate was obtained by actual fraud, the lodge was under no legal obligation to return what had been paid as assessments before it could claim that the contract was not in force. In the case it was said there was no technical tender, but where the insured died November 20, 1903, and on April 12, 1904, plaintiff's representative was notified that the lodge was willing to return all moneys paid as assessments this was sufficient. The discussion shows that many of the cases hold that if there is actual fraud in obtaining the insurance no tender need be made at all.

In Fraser v. Aetna L. Ins. Co., 114 Wis. 510, 90 N. W. 476, it is said: "It has been held that a reasonably prompt offer to return a premium conditionally received, upon obtaining knowledge of a fact essential to the condition, will, as a matter of law, prevent the receipt thereof from resulting in a waiver of a previous forfeiture; and that an unexplained retention of a premium paid after forfeiture, for a long time, with knowledge of all the facts, may, as a matter of law, result in a waiver of the forfeiture. But such authorities should not be taken to indicate that a premium received on a policy after it has lapsed must under all circumstances be returned before the assurer can interpose its defense. The evidentiary effect of the retention of a preminum, as regards indicating an intent to waive a forfeiture of a policy upon which it was paid, depends upon circumstances. * * * It has often been held that the mere retention of a premium paid to an insurance company upon a policy after forfeiture thereof, where the circumstances do not indicate an intent to appropriate the money to its own use as its own property, but do indicate a willingness to account therefor as the property of the policy holder, even though the money be retained down to the final termination of the litigation in respect to the validity of the policy, does not prevent the company from prevailing upon the plea of forfeiture. Rockwell v. Ins. Co., 21 Wis, 548; Harris v. Assoc., 64 N. Y. 196; Lewis v. Ins. Co., 44 Conn. 72."

As to doctrine that actual fraud in inception of a contract of insurance forfeits claim to any return of premiums, see 2 Cooley Briefs on Insurance, pp. 1037-1048; Joyce on Ins., sec. 1406; 2 May Ins., 3d Ed., sec. 567.

We do not see why the same rule should not prevail where insurance is by fraud continued beyond a forfeiture. But whether the actual fraud and no return should be recognized or not, retention is a mere evidentiary circumstance, and hardly seems the same thing as *acceptance* and retention, where at the time the facts are fully known. And it looks quite harsh to have ruled, as was ruled, in the principal case, that where the premium seems not to have reached the supreme lodge until the death, that the forfeiture was conclusively set at naught by mere retention, where there was a tender in court. Indeed, the money to be refunded would not necessarily belong to the beneficiary, and disposition is to be looked for rather than actual legal tender. It seems rather against human experience that any one would be thought to wish to hold $15 or $20 as his own and thereby incur a liability of several hundred dollars. It is a vastly different thing to accept a premium during the life of a policy so as to continue it in force, so far as evidencing election is concerned, and retaining one with a presumed election to make a void policy, after death effective. It is to be remembered also that, if the premium is not tendered back to a legal representative of an insured, the beneficiary may not be deprived of anything at all, because the premium is payable not to the beneficiary, but to the estate of the member.

C.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Acknowledgement** — Married Woman — A married woman cannot devest herself of legal or equitable title to land, except by deed or contract, acknowledged as prescribed by statute.—Pickens v. Stout, W. Va., 68 S. E. 354.

2. **Action**—Consolidating.—The refusal to permit the consolidation of an action with another action in which another party was impleaded was within the discretion of the trial court.—McCullough v. S. J. Hayde Contracting Co., Kan., 109 Pac. 176.

3. **Assault and Battery**—Damages.—Compensatory damages may not be recovered in an action for assault and battery, unless specially claimed.—Sloss-Sheffield Steel & Iron Co. v. Dickinson, Ala., 52 So. 594.

4. **Assignments for Benefit of Creditors.**—Good Faith.—An insolvent debtor acting in good faith may sell, deliver in payment, mortgage, or pledge the whole or any part of his property for the benefit of one or more of his creditors.—Napoleon Hill Cotton Co. v. Smith, Mo., 129 S. W. 259.

5. **Assumpsit, Action of**—Evidence.—Joint assumpsit may be shown under allegations that labor and materials were furnished at defendants' instance and request for their use and benefit.—Reifschneider v. Beck, Mo., 129 S. W. 232.

6. **Attorney and Client**—Disbarment.—That offenses for which an attorney was sought to be disbarred were committed 8½ years before there was any investigation thereof or prosecution begun was a sufficient answer thereto.—People v. Tanquary, Colo., 109 Pac. 260.

7. **Bankruptcy**—Filing Petition.—The filing of a bankruptcy petition is a caveat to all the world and in effect an attachment and injunction, so that on adjudication and qualification of the trustee the property becomes vested in him.—Loeffler v. Wright, Cal., 109 Pac. 269.

8.——Judments.—A judgment in a common-law court after the date of bankruptcy proceedings does not entitle a creditor to share in the assets administered in the bankruptcy court.—Hackett v. Supreme Council A. L. H., Mass., 92 N. E. 133.

9. **Banks and Banking**—Rules.—In spite of authorizing savings banks to make reasonable rules, a savings bank held not entitled to require a depositor to give bond to protect the bank against payment to the wrong person, where his bank book had been lost or stolen.—Bayer v. Commonwealth Trust Co., Mo., 129 S. W. 268.

10. **Bill of Lading**—Evidence.—A sale and delivery of goods need not be proved by the introduction of the bill of lading.—M. Weinstein & Sons v. Yielding Bros. & Co., Ala., 52 So. 591.

11. **Bills and Notes**—Forgery.—Act of the transferee of a forged note and mortgage in taking interest on the note and extending it held not to preclude his recovery against the transferror on his warranty.—Cluseau v. Wagner, La., 52 So. 547.

12.——Place of Contract.—A note executed in Missouri for goods sold and shipped in Indiana held an Indiana contract and hence negotiable.—Johnson v. Noble Machine Co., Mo., 129 S. W. 271.

13.——Usury.—A stipulation in a note to pay bank exchange held not usurious unless a device to cover a usurious contract.—Tipton v. Ellsworth, Idaho, 109 Pac. 134.

14. **Breach of Marriage Promise**—Chastity.—In an action for breach of marriage promise, evidence that, until plaintiff's relations with defendant became known, her reputation for chastity was good, held admissible.—McKane v. Howard, 123 N. Y. Suppl. 632.

15. **Bridges**—Guard Rails.—While not the insurer of the person or property of their customers, the proprietors of a toll bridge must exercise ordinary care to protect them, and must have guard rails where reasonably necessary.—Dardanelle Pontoon Bridge & Turnpike Co. v. Croom, Ark., 129 S. W. 280.

16. **Carriers**—Assault by Servant.—Wrongful assault by an officer on a passenger in an attempt to eject him from the carrier's station pursuant to the request of the station agent held an act for which the carrier was liable.—Whitlock v. Northern Pac. Ry. Co., Wash., 109 Pac. 188.

17.——Negligence.—A carrier guilty of negligent delay in shipping cattle held liable for all the consequences naturally resulting therefrom.—Gillespie v. Louisville & N. R. Co., Mo., 129 S. W. 277.

18.——Postal Clerk.—A postal clerk on a railroad train is entitled to the same degree of care as a passenger.—Dunlap v. Chicago, R. I. & P. Ry. Co., Mo., 129 S. W. 262.

19.——Rates.—The fact that a rate is per se reasonable held not to disprove the charge that it is unlawful.—Portland Ry., Light & Power Co. v. Railroad Commission of Oregon, Or., 109 Pac. 273.

20. **Chattel Mortgages**—Lien.—Though the evidence of a debt be changed from a simple contract to a judgment, the lien of the mortgage securing it continues until the debt is discharged.—Robinson & Co. v. Stiner, Okl., 109 Pac. 238.

21. **Clubs**—Rights of Members.—Exhaustion of a club member's remedy under its constitution and by-laws is a pre-requisite to a judicial enforcement of his personal rights.—Allee v. James, 123 N. Y. Suppl. 581.

22. **Commerce**—Reporting Credits.—The business of reporting credits through a bonded attorney's list controlled by a foreign corporation held not "interstate commerce," so as to relieve the corporation from liability for the license tax imposed by Ky. St. sec. 4224, Russell's St., sec. 6157.—United States Fidelity & Guaranty Co. v. Commonwealth, Ky., 129 S. W. 314.

23. **Conspiracy**—Overt Acts.—In a trial for conspiracy, if the overt act be a felony, the conspiracy is merged in the felony; but, where the crime charged and the overt act are of the same grade of misdemeanor there can be no merger.—People v. Coney Island Jockey Club, 123 N. Y. Suppl. 669.

24. **Constitutional Law**—Construction.—It will be presumed that language employed in a constitutional provision was intended to have the meaning given it by the court in previously construing a constitutional provision.—People v. Olson, Ill., 92 N. E. 157.

25.——Corporation.—A corporation is a "person" within the fourteenth amendment to the federal constitution, prohibiting the taking of property without due process of law.—Portland Ry., Light & Power Co. v. Railroad Commission of Oregon, Or., 109 Pac. 273.

26. **Contracts**—Duress.—The mere threat to withhold from a party a legal right which he has an adequate remedy to enforce is not duress, which will evade the execution of a contract.—Simmons v. Sweeney, Cal., 109 Pac. 265.

27.——Consideration.—A contract whereby a real estate agent agreed that, if plaintiff would purchase certain land, the agent would resell it for her within nine months, or would himself repay the price, held based on sufficient consideration.—Herkenrath v. Ragley, Wash., 109 Pac. 279.

28.——Construction.—The words "at once" in a wrecking contract held to mean within such time as was reasonable under the attending circumstances.—Wetter v. Kleinert, 123 N. Y. Suppl. 755.

29.——Recission.—Where it is established that there has been fraudulent misrepresentations or willful concealment by which one has been induced to enter into a contract, it is no defense to a recission that he might have known the truth by proper inquiry.—Davis v. Forman, Mo., 129 S. W. 213.

30. **Corporations**—Collateral Inquiry.—Due incorporation of a company claiming in good faith to be a corporation under the laws of the state cannot be inquired into in a collateral proceeding.—Higbee v. Aetna Bldg. & Loan Ass'n, Okl., 109 Pac. 236.

31.——Fraud.—The value of bank stock is largely a matter of opinion, and, unless there is some circumstance making a misrepresentation by the seller as to the value a fraud, it will ordinarily not be so regarded in law, but when the seller gives his opinion, knowing the buyer relies upon it, and at the same time conceals a fact which he knows would cause the buyer to distrust in the opinion given, the law condemns the act, and will relieve against it.—Davis v. Forman, Mo., 129 S. W. 213.

32.——Pleading.—An allegation that defendant was a corporation without stating the place of incorporation held sufficient to show that it had capacity to be sued.—Pearce v. Butte Electric Ry. Co., Mont., 109 Pac. 275.

33.——Purchase of Stock.—Fraudulent representations inducing the purchase of corporate stock are a good defense to an action against a purchaser for the price.—Sherman v. Snaughnessy, Mo., 129 S. W. 245.

34.——Subscription.—A corporate stock subscription may be withdrawn before acceptance.—Palais Du Costume Co. v. Beach, Mo., 129 S. W. 270.

35. **Covenants**—Restrictions in Deed.—Covenants in a deed restricting the use of the property to dwelling houses of a certain class, and prohibiting any trade or business structure, etc., are not void as against public policy.—Flynn v. New York, W. & B. Ry. Co., 123 N. Y. Suppl. 759.

36.——Warranty.—In an action at law on a covenant of warranty against incumbrances, plaintiff can only recover nominal damages, unless he has satisfied the incumbrances.—General Underwriting Co. of New York v. Stilwell, 123 N. Y. Suppl 653.

37. **Criminal Law**—Construction.—The Legislature may declare what constitutes a crime, but the courts must determine whether a particular act is within the intendment of the statute.—Stewart v. State, Okl., 109 Pac. 243.

38.——Embezzlement.—Broker paying general debts out of amount transmitted to him to pay for stock purchased held guilty of embezzlement.—People v. Meadows, N. Y., 92 N. E. 128.

39.——Evidence.—The testimony a witness beyond the jurisdiction of the court gave on a former occasion on the same issue and between the same parties may be given in evidence, providing accused was present and had the right to cross-examine.—Poe v. State, Ark., 129 S. W. 292.

40.——Evidence.—The admission of testimony as to experiments rests largely in the discretion of the trial judge.—McClendon v. State, Ga., 68 S. E. 331.

41.——Fraudulent Intent.—In a criminal prosecution where evidence is relevant to prove fraudulent intent, the fact that it tended to show the commission of another and different crime would not be sufficient to exclude it.—State v. Dana, Wash., 109 Pac. 191.

42.——Grand Jury Minutes.—A motion to inspect the grand jury minutes will not be granted to enable accused to ascertain the evidence by which the indictments will be supported.—People v. Coney Island Jockey Club, 123 N. Y. Suppl. 669.

43.——Gross Negligence.—Gross and culpable negligence will supply criminal intent.—State v. Irvine, La., 52 So. 567.

44.——Insanity.—In a homicide case in which the defense was insanity, testimony of physicians appointed as a committee of lunacy to examine accused held admissible in evidence.—Lane v. State, Tex., 129 S. W. 353.

45.——Intoxicating Liquors.—In a prosecution for having in possession prohibited liquor with intent to sell it, evidence of previous unlawful sale is admissible to show intent.—Hill v. State, Okl., 109 Pac. 291.

46.——Opinion Evidence.—Questions of speed and distance are subjects for opinion evidence.—McClendon v. State, Ga., 68 S. E. 331.

47.——Separate Offenses.—Where cows were shot and killed by accused as part of a single transaction, the state, having obtained a conviction for the taking of one of the cows, could not secure a conviction for the taking of the other.—La Flour v. State, Tex., 129 S. W. 351.

48. **Damages**—Substantial Performance.—Where a contract was substantially performed, the reasonable expense necessary to make the work conform to the contract is the proper measure of damages on a counterclaim in an action for the price.—McCullough v. S. J. Hayde Contracting Co., Kan., 109 Pac. 176.

49. **Deeds**—Construction.—A limitation clause in a deed irreconcilable with the consistent granting, habendum, and warranty clauses should be rejected.—Burgess v. McCommas, Tex., 129 S. W. 382.

50.——Deceased Grantee.—A deed to a grantee then deceased, "his heirs and assigns," did not vest title in an heir, and was void.—Baker v. Lane, Kan., 109 Pac. 182.

51. **Ejectment**—Incorporeal Hereditament.—Ejectment does not lie for an incorporeal hereditament, but only for a corporeal hereditament of which a sheriff can deliver possession.—Chism v. Smith, 123 N. Y. Suppl. 691.

52. **Eminent Domain**—Damages.—Right to damages for taking of land by railroad is personal and does not pass to successive owners of land.—Taylor v. New Orleans Terminal Co., La., 52 So. 562.

53.——Property Exempt From.—Right of one railroad company to use a union depot owned and maintained by two other companies cannot be secured by condemnation proceedings.—Commonwealth v. Norfolk & W. Ry. Co., Va., 68 S. E. 351.

54. **Equitable Conversion**—Agreement to Sell.—An agreement of sale of real property of decedent revoked before his death, the part payment made to him being returned, did not work an equitable conversion of the realty into personalty.—In re Goetz's Estate, Cal., 109 Pac. 145.

55. **Equity**—Follows Law.—When a purely legal title is drawn into an equity case, it is decided according to the rules of law, equity in such case following the law.—Hayes v. Schall, Mo., 129 S. W. 222.

56.——Multifariousness.—A bill is multifarious when it states distinct, separate, and independent equities that can better be adjudicated in more than one suit.—Arcadia Mercantile Co. v. Branning, Fla., 52 So. 588.

57.——Quieting Title.—To maintain a bill to quiet title, it is necessary to aver and prove that at the time of the institution of the suit complainant's possession was peaceable and under claim of ownership.—Kinney v. Steiner Bros., Ala., 52 So. 593.

58. **Evidence**—Fabrication.—Admissions fabricated by one party as purported admissions of the other party are admissible in evidence against the party fabricating them.—Christy v. American Temperance Life Ins. Ass'n, 123 N. Y. Suppl. 740.

59.——Judicial Notice.—Judicial notice will be taken of the fact that a detached stone 7½ feet long, 3 feet wide, and 18 inches thick, in the roof of the entry of a coal mine, can be carefully secured or taken down.—Princeton Coal Mining Co. v. Howell, Ind., 92 N. E. 122.

60.——Judicial Notice.—Judicial notice will be taken of facts shown by the United States census.—State v. Brooks, Wash., 109 Pac. 211.

61.——Lunacy.—In an action against alienists for mal-practice in issuing a lunacy certificate against plaintiff, evidence of lay witnesses that certain words and acts of plaintiff were rational in their opinion held admissible.—Warner v. Packer, 123 N. Y. Supp. 725.

62.——Res Gestae.—One's declarations or threats just before throwing a lighted match into gas, causing an explosion, held substantive evidence of his motive.—Watson v. Kentucky & I. Bridge & R. Co., Ky., 129 S. W. 341.

63. **Executors and Administrators**—Costs.—Costs of settling an estate held payable out of funds realized from property passing to legatees mentioned in the will.—Platt's Ex'r. v. Locke, Ky., 129 S. W. 329.

64.——Specific Performance.—Where decendent failed to perform a contract to leave claimant her property as compensation for her services, claimant could not only sue for specific performance, but was entitled to recover at law the value of her services.—Taylor v. Hudson, Mo., 129 S. W. 261.

65. **Guardian and Ward**—Surcharging Accounts.—Where a guardian failed to charge himself with proper amounts for the rent of the homestead and other property of the minor wards, the court could surcharge the account and charge him for the rental value.—Gatlin v. Lafon, Ark., 129 S. W. 284.

66. **Habeas Corpus**—Bail.—When a homicide is proved or admitted, the court on application for bail will not presume either justification or mitigation because the evidence for the state fails to show their absence.—In re Fraley, Okl., 109 Pac 295.

67. **Homicide**—Dying Declarations.—Though all dying declarations are exparte and are taken when accused does not have the right of cross-examination, they are not objectionable for that reason.—Lane v. State, Tex., 129 S. W. 353.

68.——Manslaughter.—To reduce a homicide from murder to manslaughter, there must be adequate provocation, and the fatal blow must be the unpremeditated result of the passion thus aroused.—In re Bollin, Okl., 109 Pac. 288.

69. **Indictment and Information**—Second Offenders.—Where it is sought to impose an increased punishment on second offenders, it is essential that the first offense be charged in the indictment and proved.—People v. Schleth, 123 N. Y. Suppl 686.

70. **Insurance**—Fraud.—A verdict for only $600, when proofs of loss were for $953, held not to establish the proofs were fraudulent, so as to avoid the policy.—Hirschman v. Fireman's Fund Ins. Co. of San Francisco, Cal., City 123 N. Y. Suppl. 781.

71.——Insanity.—If insured fell into a cistern and was drowned while trying to hide herself from imaginary pursuers in an insane delusion, the accidental fall, and not her volitional act, was the proximate cause of her death.—Christy v. American Temperance Life Ins. Ass'n, 123 N. Y. Suppl. 740.

72.——Misrepresentations.—A beneficiary in a mutual benefit certificate, seeking to obtain a rescission of a release of the certificate on the ground of deceit, need only prove that the release was obtained by misrepresentations

made by an unauthorized person.—Attorney General v. Supreme Council A. L. H., Mass., 92 N. E. 136.

73.——Proof of Death.—While prima facie statements contained in the proof of death are true, they may be shown to have been erroneously or inadvertently made.—Christy v. American Temperance Life Ins. Ass'n, 123 N. Y. Suppl. 740.

74. **Interest**—Insolvency.—As a general rule no interest is allowed for delay after the date of the insolvency of the debtor.—Attorney General v. Supreme Council A. L. H., Mass., 92 N. E. 134.

75. **Intoxicating Liquors**—Interstate Shipment.—A car load of beer shipped into the state by mistake, and intended to be shipped to a third state, held an interstate shipment, not subject to confiscation.—Rochester Brewing Co. v. State, Okl., 109 Pac. 298.

76.——Interstate Shipment.—Where liquor was shipped from Louisville to a town in Oklahoma, and was placed by the employes of the interstate carrier in a car used for storage purposes, and was seized by state officers, the whisky being still in the hands of the interstate carrier, the state law had not attached to it.—St. Louis & S. F. R. Co. v. State, Okl., 109 Pac. 230.

77. **Joint Tenancy**—Ouster.—An ouster between joint tenants may be effected by open, notorious, and exclusive possession by a stranger under deed or executory contract of sale executed by a co-tenant purporting to convey the whole of the land.—Pickens v. Stout, W. Va., 68 S. E. 354.

78. **Judgment**—Revival.—Scire facias is the only mode of reviving a judgment.—Bick v. Dixon, Mo., 129 S. W. 254.

79. **Jury**—Bias.—Prejudice of jury commissioners against a particular crime is no ground for a challenge to the panel or to the individual jurors.—Remer v. State, Okl., 109 Pac. 247.

80. **Landlord and Tenant**—Re-entry.—Demand by a landlord for possession and the tenant's refusal to deliver are equivalent to a re-entry.—Harmon v. Pohle, Ind., 92 N. E. 119.

81.——Renewal.—In an action for breach of an option to renew a lease, plaintiff was bound to allege and prove that he exercised his option to continue the term or notified the lessor of his desire to exercise his privilege.—Loeffler v. Wright, Cal., 109 Pac. 269.

82. **Libel and Slander**—Public Question.—A newspaper company commenting in good faith without malice on facts regarding public health or safety held not liable for punitive damages in a libel action based thereon.—Morasca v. Item Co., La., 52 So. 565.

83. **Malicious Prosecution**—Advice of Counsel.—Advice of counsel will be a defense to a suit for malicious prosecution only when there has been reasonable diligence to learn the facts, and the real facts are fairly stated to the counsel in good faith as the basis for his opinion.—Smith v. Fields, Ky., 129 S. W. 325.

84.——Evidence.—In an action for malicious prosecution, the grand jury's docket entry showing no bill was admissible to show the termination of the prosecution.—Abingdon Mills v. Grogan, Ala., 52 So. 596.

85. **Master and Servant**—Assumption of Risk.—A master's promise to repair is only relevant on the question of assumed risk.—Carran v. Refrigerator Co., 123 N. Y. Suppl. 682.

86.——Assumption of Risk.—A driver in a coal mine did not assume the risk of the operator's failure to perform the statutory duty to make a dangerous place safe, and exclude the employes therefrom until it was made safe.—Princeton Coal Mining Co. v. Howell, Ind., 92 N. E. 122.

87.——Care.—Reasonable care required in the use of electricity means utmost effort to keep the wires properly insulated.—Clonts v. Laclede Gaslight Co., Mo., 129 S. W. 238.

88.——Fellow Servants.—Servants in different departments or grades of employment are not fellow servants.—Milton's Adm'x v. Frankfort & V. Traction Co., Ky., 129 S. W. 322.

89.——Proximate Cause.—To authorize a recovery for injuries to an employe, the negligence of the employer must have proximately caused the injury.—St. Louis, S. F. & T. Ry. Co. v. Cason, Tex., 129 S. W. 394.

90.——Safe Appliances.—The duty of a master to furnish reasonably safe appliances is nonassignable.—Mitchell v. United States Coal & Coke Co., W. Va., 68 S. E. 366.

91——Street Railway.—Motormen of colliding cars of a street railway company held not fellow servants.—Milton's Adm'x v. Frankfort & V. Traction Co., Ky., 129 S. W. 322.

92. **Mortgages**—Rents.—A first mortgagee held entitled on default to rents in the hands of a receiver under foreclosure of a subsequent mortgage.—State Bank v. Cohen, 123 N. Y. Suppl. 747.

93.——Trustee.—A trustee in a deed of trust to sell the land conveyed cannot delegate the power to make a sale.—Markel v. Peck, Mo., 129 S. W. 243.

94.——Usury.—A purchaser of premises at a bankrupt sale subject to a mortgage cannot question the mortgage on the ground of usury.—Higbee v. Aetna Bldg. & Loan Ass'n, Okl., 109 Pac. 236.

95.——Variance.—Where the provisions of a note secured by mortgage vary from the terms of the mortgage, the provisions of the note will control.—Tipton v. Ellsworth, Idaho, 109 Pac. 134.

96. **Municipal Corporations**—Nuisance.—An unauthorized obstruction of a public street is a nuisance per se.—City of New Orleans v. Lenfant, La., 52 So. 575.

97.——Pedestrian.—A pedestrian on a city sidewalk having no knowledge of defects therein is not required to constantly watch for defects or obstructions, but may assume that it is reasonably safe.—Bentley v. Rothschild Bros. Hat Co., Mo., 129 S. W. 249.

98. **Names**—Notice.—A default judgment based upon service by publishing a notice which stated defendant's name as "Joseph Remer" is valid as against "Joseph Renner;" the names being idem sonans.—Puckett v. Forsythe, Kan., 109 Pac. 285.

99. **Navigable Waters**—Littoral Right.—A littoral right held to be only an appurtenance or easement incident to ownership, but to support an action to remove a structure interfering therewith.—Chism v. Smith, 123 N. Y. Suppl. 691.

100. **Negligence**—Special Duty.—Where one is charged with a special duty, the non-performance of which involves danger to others, the failure to perform the duty is criminal negligence.—State v. Irvine, La., 52 So. 567.

101. **Parties**—Misjoinder.—A misjoinder not apparent on the face of a petition can be taken advantage of by answer only.—Reifschneider v. Beck, Mo., 129 S. W. 232.

102. **Partition**—Common Source of Title.—Where all the parties to a partition suit claim title from common source, title in such source is conclusively presumed for the purposes of the suit.—Pickens v. Stout, W. Va., 68 S. E. 354.

103. **Partnership**—Interest.—In the absence of any agreement to the contrary, the law assumes that the several contributions to firm property by the partners were equal, and that there was an equal division of the profits and loses.—Yatsuyanagi v. Shimamura, Wash., 109 Pac. 282.

104.——Surviving Partner.—The representative of a partner dying pending an action against him should be substituted as party defendant, where an action against the surviving partners is barred.—Selignan v. Friedlander, 123 N. Y. Suppl. 583.

105. **Pleading**—Construction.—The character of a pleading will not be measured by the style or title given by the pleader, but rather by reference to the substance thereof.—Johnson v. Pacific Bank & Store Fixture Co., Wash., 109 Pac. 205.

106.——General Denial.—Under a general denial, defendant may prove any state of facts tending to show plaintiff never had a cause of action.—Hellmuth v. Benoist, Mo., 129 S. W. 257.

107. **Principal and Surety**—Discharge of Surety.—Reduction of rent by landlord without knowledge of surety held not to discharge surety, who on default was liable for the rent due until action was brought.—Ullmann Realty Co. v. Hollander, 123 N. Y. Suppl. 772.

108. **Public Lands**—Location.—One locating land under a certificate held not a mere trespasser, but an owner of an interest in the land.—Duren v. Bottoms, Tex., 129 S. W. 376.

109. **Quieting Title**—Tax Deed.—Party claiming title under a tax deed to a grantee who was dead when it was executed as his heir cannot maintain action to quiet title.—Baker v. Lane, Kan., 109 Pac. 182.

110. **Reformation of Instruments**—Chattel Mortgage.—A chattel mortgage may be reformed in the same action in which it is sought to be enforced.—John T. Stewart's Estate, Inc., v. Falkenberg, Kan., 109 Pac. 170.

111. **Sale**—Fraud.—That plaintiff had knowledge of the fraudulent nature of defendant's business from his purchase of a former contract for sale of a patent article held not to preclude his recovery of the amount paid defendant for a subsequent contract.—Depue v. Swift 1904 Clothes Washer Co., Mo., 129 S. W. 230.

112. **Sheriffs and Constables**—Bond.—Liability for money received by a sheriff as such is not covered by his bond as ex officio tax collector.—American Bonding & Trust Co. v. Garret, Tex., 129 S. W. 398.

113. **Specific Performance**—Certainty.—To be enforceable in equity, a contract for purchase of land must be complete, fixing the price and terms as well as the identity of the land.—Pickens v. Stout, W. Va., 68 S. E. 354.

114.——Evidence.—A promise to compensate plaintiff for her services in caring for decedent held sufficient to support an action for specific performance.—Taylor v. Hudson, Mo., 129 S. W. 261.

115.——Pleading.—A bill for specific performance must allege an offer to pay the consideration or willingness to do so and that the contract is just and equitable.—Loeffler v. Wright, Cal., 109 Pac. 269.

116. **Statutes**—Construction.—To give a statute the effect obviously intended by the Legislature, a court may correct a manifest error in the use of words.—State v. Radford, Kan., 109 Pac. 284.

117.——Criminal Law.—The General Assembly can by special statute carve misdemeanors out of facts declared by law to be felonies.—State v. Wall, La., 52 So. 556.

118. **Taxation**—Assessment.—As affecting the taxable value of a special franchise, its real value depends, not upon what it earns, but upon what it can earn by proper management.—People v. Woodbury, 123 N. Y. Suppl. 599.

119.——Description.—An assessment of land for taxation in the name of the "estate" of a person, without any qualifying or explanatory description, is void on its face.—McKie v. Brown, N. Y., 92 N. E. 131.

120.——Illegal Assessment.—Plaintiff having voluntarily paid taxes illegally assessed against her before any attempt had been made to enforce collection thereof, she could not recover them.—City of Louisville v. Becker, Ky., 129 S. W. 311.

121.——Lien.—The lien of a bank on shares of stock for reimbursement for taxes paid thereon attaches to the stock and its earnings, irrespective of any transfer of the stock.—Shainwald v. First Nat. Bank of Weiser, Idaho, 109 Pac. 257.

122.——Tax Title.—The defect in a tax title arising from the failure of the grantee in the tax sale to serve on the occupant the notice required, inures to the benefit of the owner of the fee whose title is attempted to be taken away from him under the sale.—Rourke v. Metz, 123 N. Y. Suppl. 720.

123. **Trade-Marks and Trade-Names**—Piracy.—One held required to use his name honestly, and not as a means of pirating on the good will and reputation of a business rival.—Kaufman v. Kaufman, 123 N. Y. Suppl. 699.

124. **Trial**—Verdict.—Where a sealed verdict has been rendered, but which, when introduced, is objected to by some of the jurors who have signed it, the court may send the jurors back to consider the verdict.—Wirt v. Reid, 123 N. Y. Suppl. 706.

125. **Trusts**—Discretion.—A trustee of an express trust invested with discretion may not, unless expressly authorized to do so, delegate his powers.—Markel v. Peck, Mo., 129 S. W. 243.

126.——Incompetent Beneficiary.—A trustee for an incompetent held bound to use the income for the incompetent's support, and was liable for the value of maintenance furnished to the incompetent by a third person with the trustee's knowledge.—Cooper v. Carter, Mo., 129 S. W. 224.

127.——Wills.—Persons named as beneficiaries in pass books held by testatrix held to take as cestuis que trustent at death of testatrix, and not as legatees under her will.—Wait v. Society for Political Study of New York City, 123 N. Y. Suppl. 637.

128. **Vendor and Purchaser**—Contract.—A contract binding one party to sell and the other to purchase cannot be an option contract.—Collier v. Robinson, Tex., 129 S. W. 389.

129.——Notice.—Implied notice to a purchaser of adverse interests arises from knowledge of particular facts unless the law charges notice by registry or other token.—Daly v. Rizzutto, Wash., 109 Pac. 276.

130.——Quitclaim.—A grantee by quitclaim deed held not a purchaser in good faith and for value within Civ. Code, sec. 1214.—House v Ponce, Cal., 109 Pac. 161.

131. **Waters and Water Courses**—Lower proprietor.—A lower proprietor may protect himself from surface water not flowing in a well-defined channel.—Jackson v. Keller, Ark., 129 S. W. 296.